(3)

No. 04-333

Supreme Court, U.S.
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In The

Supreme Court of the United States

JAMES C. LOWE,

Petitioner,

v.

WAL-MART STORES, INC. ASSOCIATES HEALTH AND WELFARE PLAN, and WAL-MART STORES, INC., as "De facto Plan Administrator, and, DAVID D. GLASS, JOHN B. MENZER, PAUL R. CARTER, JOSEPH S. HARDIN JR., as Plan Trustees, and THE ADMINISTRATIVE COMMITTEE, as Plan Administrator,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY TO BRIEF IN OPPOSITION

JAMES C. LOWE
Petitioner Pro se
1971 Honeysuckle Lane
Atlanta, GA 30311
(404) 758-6439

QUESTIONS PRESENTED

1. All Questions Presented within the PETITION FOR WRIT OF CERTIORARI are lawfully before the Court and the following is submitted for clarification of Misstatements of Fact or Law made in the Brief in Opposition .

2. Whether a benefit plan governed by the Employee Retirement Income Security Act of 1997 ("ERISA") can require a Non-Signatory Plan Beneficiary to execute a reimbursement and subrogation form when said form would be unenforceable against a Third-Party Tort-feasor due to the fact that it would create an Illegal Contract, Contravening Public Police and Corrupting Legislation of the State.

3. Whether the ERISA ACT is UNCONSTITUTIONAL with regard to Single Employer Benefit Plans, due to Perpetual Conflict of Interest.

4. Whether there is a conflict among the Circuit Courts of Appeal with regard to proper procedural Due Process of Law to be applied within ERISA actions.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF CITED AUTHORITIES iv

CONTRADICTION OF ALLEGED MISTATEMENTS ... 1
OF FACT OR LAW IN THE PETITION

STATE COURT ARBITRATION AWARD 1

PROFESSIONAL MISCONDUCT 2

REQUEST FOR ERISA PLAN DOCUMENTS 2
Mr. Lowe's Right to File Request for Plan Documents Was impaired by the fact that he was not receiving Group Health Care Benefits.

PARTIAL TORT SETTLEMENT 3
Mr. Lowe's Partial Settlement did not fully Compensate his total financial loss.

FEDERAL ACTION STAYED 3

SUPERIOR COURT ORDER IS A VOID JUDGMENT ... 4
The alleged Superior Court's Summary Judgment is Void On its Face due to Lack of Jurisdiction over Third-Party Defendant WAL-MART.

TABLE OF CONTENTS, Cont.

FEDERAL COURT OPINIONS UNLAWFUL 5
The Alleged Grant of Summary Judgment by the District Court is Constitutionally Infirmed and Therefore can not lawfully be Affirmed by The Court of Appeals for the Eleventh Circuit.

RESTATEMENT OF REASONAS FOR GRANTING THE PETITION 6
1. No ruling enforceabie against ERISA Beneficiary.
2. No Retrospective application of Law within the State of Georgia.

JUDGMENT CONFLICTS WITH DECISSIONS OF THE SEVENTH CIRCUIT 8
There is a Conflict Among The Circuit Court of Appeals with regard to Procedural Due Process to be Applied, with regard to ERISA cases.

CONSTITUTIONALITTY OF ERISA CHALLANGED 9

SUMMARY 10

CONCLUSION 10

TABLE OF CITED AUTHORITIES

Anthony v. Penn, 92 S.E.2d 14 (Ga. 1956) 7

Cagle v. Brunner, 112 F.3d 1510 (1997) 7

Fed. Ins. Co. v. Travelers, 280 F.3d 1356 (2002) 7

Firestone v. Bruch, 489 U.S. 101 (1989) 5

FMC Corp. v. Holiday, 498 U.S 52 (1990) 5

Godfrey v. Bell South Tel. 89 F.3d 755 (11th Cir. 1996) 8

Gries v. WAL-MART, "Unpublished" (11th Cir. 1998) 3

Hayes v. Howell, 251 Ga. 580 (1983) ..... Pet. p. 6

Kentucky Assoc. of Health Plans Inc. v. Miller, U.S.
U.S. Supreme Court No. 00-1471 (2003) ..... Pet. p.27

Moate v. Moate, 456 S.E.2d 502 (Ga 1995) ..... Pet. p.11

Met. Life v. Massachusetts, 471 U.S. 724 (1985) ... Pet. p. 8

Newell v. Prudential, 904 F2d 644 (1990) ..... Pet p.26

Pennoyer v. Neff, 95 U.S. 714 4

Pullman-Standard v. Swint, 456 U.S. 273 (1982) ... Pet. p. 8

Rush Prudential, 536 U.S. 387 ..... Pet. p. 27

Shaw v. Delta Air Lines, 463 U.S. 85 (1983) ..... Pet. p. 25

Umum Life v. Ward, 199 S.Ct. 1380 (1999) ..... Pet. p .27

WALL-MART v. Wells, 24 EBC 1673 (7TH Cir. 2000) 8

Wrightsman v. Hardware Dealers Mutual Insurance, 147 S.E.2d 860 (Ga 1966) ..... Pet. p. 5

CONSTITUTIONAL, STATUTORY, and REGULATORY PROVISIONS

U.S. Constitution 5

ERISA 2,6,9

Constitution of Georgia 5

Georgia Arbitration Code O.C.G.A. 9-9-1 1

O.C.G.A. 1-3-5 7

Uniform Superior Court Rules of Fulton County Georgia Rule 4.4 4

Make Whole Doctrine 3

CONTRADICTION OF ALLEGED MISTATEMENTS OF FACT OR LAW IN THE PETITION

Petitioner Lowe submits the following to refute the Respondents erroneous assertions of Misstatements of Fact or Law within the Petition.

STATE COURT ARBITRATION AWARD

The "Arbitration Award" entered by The State Court of Fulton County on June 5, 2002 is a "VALID JUDGMENT" Against WALL-MART STORES, INC. d/b/a WAL-MART STORES, INC. ASSOCIATES HEALTH AND WELFARE PLAN. Petition. App. 37a-39a

Said "Award" predates the Opinion entered by the U.S. District Court on June 24, 2002 and therefore is the "Right Result" under Georgia Law, in the companion case *Center Neurology v. Lowe v. WAL-MART*. Petitioner Lowe and WAL-MART are Identical Parties within the above referenced State Court Arbitration Award.

Respondents allegations of "Clarification and Amendment" are not available under Georgia Law. No Appeal was taken, No Objection was made to the Award, and a State Court Judge can not make "Sua sponte amendment in an "Award." See: O.C.G.A. 9-9-1 et seq. Also See: Appellants Response to Supplement the Record on appeal. Filed August 11, 2003 in Eleventh Circuit Court of Appeals.

Respondents Agent's assertion to the contrary is a Material Misrepresentation of a Material Fact, with regard to the "VALID JUEGMENT" against Respondent WAL-MART. Respondents Brief In Opp. p.1.

PROFESSIONAL MISCONDUCT

The foregoing Material Misrepresentation of a Material Fact regarding the "VALID" Arbitration Award is indicative of the "False Pleadings" and "Verification of False Pleadings" which has plagued the Companion Cases within the State Courts of Fulton County. The Mails have been used in an ongoing effort "To Perpetuate a Perpetrated Fraud" upon the Courts of the State of Georgia, and upon Plaintiff-Appellant-Petitioner Lowe.

THEREFORE Petitioner Lowe submits that the Counsel of Record Ashley B. Abel, South Carolina State Bar No.10097, Is "UNFIT" to serve within this Honorable Court and that he has engaged in conduct unbecoming a member of the Bar of this Court. Petitioner Lowe requests that this Court conduct an investigation into the "Willful Professional Misconduct" of one Ashley B. Abel, pursuant to U.S. Supreme Court Rule 8.

REQUEST FOR ERISA PLAN DOCUMENTS

Respondents assertions that Petitioner Lowe did not make requests for Plan Documents is misleading. Due to the fact that Petitioner Lowe was not receiving health care benefits he was in a different category than his "Participant Wife." Therefore Lowe had to avail himself of the only remedy at his disposal. He had to have his "Participant Wife" request Plan Documents on his behalf. ERISA 29 U.S.C.A. 1024(b)(1).

Lowe's claim of failure to produce documents is based upon the fact that incomplete documents were furnished to his wife and therefore numerous requests were made for said ERISA Plan Documents on Lowe's behalf. Lowe's claim of failure to Produce documents is based upon a "Derivative Right" to Plan Documents, premised upon the fact that Lowe would have had an "Absolute Right" to said Plan Documents, if his Health Care Benefits had not been "Unlawfully Denied."

PARTIAL TORT SETTLEMENT

Lowe reported his "Partial Settlement" to WAL-MART. This fact is recorded within the U.S. DEPARTMENT OF LABOR records. Lowe submitted a request under the Freedom of Information Act to secure Plan Documents and discovered that the DEPT. of LABOR had already launched an Investigation of WAL-MART HEALTH PLAN, based upon "Voluminous Complaints" from many hundreds of Plan Participants regarding improper denial of their Health Care Benefits. U.S. DEPT. of LABOR found violations of the ERISA Act and "Ordered Corrections."

Lowe's "Partial Settlement" did not fully compensate his Economic Loss. WAL-MART paid several thousand dollars in benefit payments for Lowe triggering the MAKE WHOLE DOCTRINE. *Gries v. WAL-MART (R3-51).* Petition p.7. MAKE WHOLE DOCTRINE applies, when benefits granted.

Respondent's Agent's assertion to the contrary is a Material Misrepresentation of a Material Fact, with regard to Notice to WAL-MART regarding partial settlement. Brief in Opp. p.3.

FEDERAL ACTION STAYED

The Honorable Orinda D, Evans entered an Order on May 24, 1999, staying the District Court action pending resolution of the cases proceeding within State and Superior Courts of Fulton County.

Judge Evans ruled that "State Law" was controlling within these related actions and that lawful resolution would be dispositive, with regard to the Federal action. The State Court Arbitration Award is the "Right Result" under Ga. Law.

SUPERIOR COURT ORDER IS A VOID JUDGMENT

On November 29, 2001, hearing was held before the Honorable Wendy L. Shoob, Superior Court Judge. Mr Able Respondent's Agent and Counsel of Record in this proceeding appeared in Superior Court without filing a Petition to be Admitted Pro Hac Vice. Mr. Able is not licensed to practice Law within the State of Georgia. Uniform Superior Court Rules, of Fulton County Rule 4.4, require that an attorney from another state must file Petition to be Admitted Pro Hac Vice, prior to their appearance and that an Order reflecting the disposition of said Petition must be filed with the Clerk of Court, prior to his appearance and that this provision may not be waived by the Court.

Based upon the foregoing Respondent WAL-MART was not represented by an "Attorney" licensed to practice Law within the State of Georgia. Wherefore: the Superior Court lacked "In Personum Jurisdiction" over the Defendant WAL-MART. Therefore: any Judgment or Order entered in said Court with regard to Defendant WAL-MART is infact a "VOID JUDGMNET," a "Nullity," of no force or effect. *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565

Additionally, Petitioner Lowe filed Notice of Appeal on December 10, 2001 and Superior Court has not processed Lowe's Appeal. Furthermore, on April 18, 2003 Petitioner Lowe filed Motion To Make Additional Findings of Fact and Conclusions of Law & Alter or Amend Judgment Accordingly, and said Motion is still Pending, within the Superior Court.

THEREFORE the Respondent's Agents assertion that Summary Judgment was granted to WAL-MART is a Material Misrepresentation of a Material Fact.

FEDERAL COURT OPINIONS UNLAWFUL

On June 24, 2002 The District Court dissolved the Order for Stay entered on May 24, 1999, based upon the "VOID JUDGMENT" of the Superior Court of Fulton County. See page 4 this writing.

Previously the District Court had made numerous egregious errors with regard to Proper Procedural Due Process of Law to be afforded in ERISA cases.
DENIAL OF DUE PROCESS OF LAW, Petition p.21-30.
U.S. Constitution, *Firestone*, *FMC Corp.*, etc.

The U.S. Court of Appeals for the Eleventh Circuit failed to address the foregoing Denial of Due Process and affirmed a Constitutionally Infirmed Judgment.

Resolution of the UNRESOLVED ISSUES as setout within the Petition p.30 will result in a different ruling.

Both the U.S. District Court and U.S. Court of Appeals For the Eleventh Circuit have exceeded their jurisdiction based upon "DENIAL OF DUE PROCESS OF LAW."

Based upon the foregoing the Opinions of the U.S. District Court and U.S Court of Appears are UNLAWFUL and should not stand, as they are the result of Denial of Due Process. U.S. Constitution Amendment 5, and Constitution of Georgia.

RESTATEMENT OF REASONS FOR GRANTING THE PETITION

1. There is no ruling that is enforceable against an ERISA "Plan Beneficiary" with Regard to Execution of a Reimbursement and Subrogation Form.

The issue before This Honorable High Court is not if a Benefit Plan can require a "Pan Participant" to Execute a Reimbursement and Subrogation Form, but rather if there is any enforceable provision that would require a "Plan Beneficiary" to Execute such a form.

The ERISA Act identifies, within the Statute, the definition of the Term "PARTICIPANT" 29 U.S.C.A. 1002(7) as an "Employee or Former Employee."

The "Employee" as identified above is a "Signatory" on the Group Health Plan Agreement. Lowe's wife is an Employee.

The ERISA Act identifies, within the Statute, the Definition of The Term "BENEFICIARY" 29 U.S.C.A. 1002(8) as a "Person designated by the PARTICIPANT who is entitled to a Benefit thereunder."

The "Person" as identified above in 1002(8) is a "NON-SIGNATORY BENEFICIATY" within the Group Health Plan, and is a NON-PARTCIPANT. Petition p.15-17.

No Agreement exists between the ERISA Plan and the "Person" designated as a BENEFICIARY. Petition Id.

2. There is no retrospective application of Law within the State of Georgia.

Additionally, the U.S. District Court used Retrospective Application of *Cagle v. Brunner* 112 F.3d 1510 (11th Cir.1997) as the primary pillar in the determination to grant Summary Judgment to WAL-MART. Lowe's claims arose in 1994. Petition App. p.21-22.

There is no "Retrospective Application of Law" within the State of Georgia.
Constitution of Georgia Art. I Sec. I, Paragraph I and X.
O.C.G.A. 1-3-5. *Anthony v. Penn.*, 92 S.E.2d 14 (Ga. 1956).

Rulings made by the Highest Court in the State are binding upon Federal Courts that have situs within the several States. *Fed. Ins. Co. v. Travelers*, 280 F.3d 1356 (11th Cir. 2002).

The District Courts reliance on *Cagle* is misplaced based upon the fact that in Cagle the "Minor Child" Cobbie Brunner was the injured party. The Plan Participant was the Custodial Parent and therefore PARTICIPANT-SIGNARORY with the Plan. PARTICIPANT was required to sign for a Minor Child.

Based on the foregoing *Cagle* is inopposite to the relevant facts of *LOWE v. WAL-MART*. Signature of Plan Participant in *LOWE v. WAL-MART* would be of no effect.

It does not follow that the requirement of signature for a Minor Child, by a Plan Participant, translates into a requirement for signature by a Spousal BENEFICIARY.

JUDGMENT CONFLICTS WITH DECISIONS OF THE SEVENTH CIRCUIT

Review is Warranted, based upon the fact that the Ruling of the Eleventh Circuit Court of Appeals conflicts with the Seventh Circuit Opinion, as clearly articulated within *WALL-MART v. Wells*, 24 EBC 1673 (7th Cir. 2000).

Contrary to the assertions presented by Respondents Agent within their Brief In Opp. 6-7 close reading of the issues presented in *Wells* articulates clearly, with regard to the WAL-MART Plan Documents, that: "For there is no reference to discretion in the part of the plan documents that deals with the plan's right to Reimbursement--only in the part that deals with benefits determinations." Wells, Id. @ 1676.

Accordingly the Seventh Circuit, in *Wells*, has established the incontrovertible fact that WAL-MART Plan Documents, as they existed prior to 2000, contained No Grant of Rights to The Plan administrator, with regard to Reimbursement.

Therefore the assertion within Lowe's Original Complaint alleging UNENFORCABILITY OF PLAN DOCUMENTS has been upheld through the findings in *Wells*.

Accordingly, it would follow if the Plan Documents are not Enforceable, with regard to Reimbursement then a "Bench Trial" would be required to establish what portions of the Plan Documents are infact enforceable, if any. De Novo Review mandated when conflicts established within Plan Documents. *Godfrey v. Bell South*, 89 F.3d 755 (11th 1996).

Respondents assertions to the contrary are erroneous.

CONSTITUTIONALITY OF ERISA CHALLANGED

Plaintiff-Appellant-Petitioner James C. Lowe restates his Formal Assertion of Unconstitutionality of the ERISA Act, With regard to Single Employer Health Care Benefit Plans on The following grounds:

Petitioner hereby incorporates by reference the following: Appellants Br. p.8 -10. Petition supra.

The ERISA Act although well intentioned becomes little more than a "Patchwork of Overlapping Contradictions" which have been described as "Circular" "Not Helpful" "Without Direction" and "Lacking Clear Intent."

This Honorable High Court has come to grips with ERISA Cases, with alarming frequency. Petitioner is aware of numerous rulings from this Court addressing the ever widening source of disputes that continuously spring from ERISA.

Most recently within *Kentucky Assoc. v. Miller* this Court addressed yet another Petition for redress of ERISA violations and redefined the parameters of "State Law Preserved" within the context of ERISA.

As *Lowe v. WAL-MART* was matriculating through the U.S. District & Eleventh Cir. Courts during this time it would appear that application of State Law preserved under EIRSA would deserve a closer look, particularly in light of the fact that the District Court failed to establish which Laws are Preserved, within the State of Georgia under ERISA.

SUMMARY

The Relevant Facts of this case are plainly stated. The Arbitration Award entered in State Court of Fulton County Georgia against the Respondent WAL-MART is a Final Judgment, that has not been appealed and is therefore Res Judicata, as to the several parties.

The alleged Summary Judgment in the Superior Court of Futon County is a "VOID Judgment" and is of "No Effect."

Denial of Due Process of Law within the U.S. District Court results in a Judgment that is clearly, inevitably, unmistakably CONSTITUTIONALLY INFIRMED. Petition p.21-30.

Affirmation by The Eleventh Circuit Court of Appeals of a CONSTITUTIONALLY INFIRMED JUDGMENT brings into question THE RULE OF LAW. Petition p.24-25.

CONCLUSION

For the foregoing reasons The Petition for Writ of Certiorari should be granted, in the interest of Justice. The Court may wish to consider summary reversal.

Respectfully submitted,

JAMES C. LOWE
Petitioner Pro se
1971 Honeysuckle Lane
Atlanta, Georgia 30311
(404) 758-6439